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## Department of Toxic Substances Control

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**Edmund G. Brown Jr.**  
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### **TITLE 22**

### **EMERGENCY REGULATION**

### **Amending Section 66272.62, Determining the Initial Penalty for Each Violation.**

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#### **REQUIRED EMERGENCY STATEMENT (1 CCR § 48)**

"Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulation as set forth in Government Code section 11349.6."

#### **TITLE 1 CCR § 50(a)(5)(A) COMPLIANCE STATEMENT**

In Compliance with Government Code 11346.1(a)(2) the Department of Toxic Substances Control provided public notice of proposed rulemaking on 6/22/2018.

#### **FINDING OF EMERGENCY**

Health and Safety Code section 25150 allows the Department of Toxic Substances Control (DTSC) to adopt, and revise when appropriate, standards and regulations for the management of hazardous wastes to protect against hazards to public health, domestic livestock, wildlife, or the environment. Health and Safety Code section 58009 authorizes DTSC to commence and maintain actions to enforce its rules and regulations and, among other things, to protect and preserve the public health. Health and Safety Code section 58012 authorizes DTSC to adopt and enforce regulations for the execution of its duties.

DTSC's primary enforcement authority is granted by Health and Safety Code section 25180. Pursuant to Health and Safety Code section 25185, DTSC has the authority to enforce hazardous waste laws by inspecting places or "environment where hazardous wastes are stored, handled, processed, disposed or, or being treated to recover resources." Local health officers and local agencies may also be authorized to enforce the State hazardous waste laws. DTSC conducts numerous inspections throughout the year many of which may be the result of a complaint, a referral from a law enforcement

agency, or regularly scheduled inspection or a grant commitment to the United States Protection Agency (US EPA) to conduct the inspection.

State law provides prescriptive timeframes for how DTSC conducts an inspection. DTSC is required to provide the operator of a facility that it has inspected a written summary of alleged violations at the conclusion of an inspection. Moreover, DTSC is required to provide an inspection report to the operator no later than 65 days from the date of inspection unless there are circumstances that may delay the ability to provide the report. (Health & Saf. Code, §25185.) As a matter of policy, DTSC seeks to initiate and complete enforcement actions in a consistent and timely manner. DTSC strives to initiate formal enforcement actions “as early as possible, and no later than 180 days” from the date of inspection. Initiation of an enforcement action includes, but is not limited to, issuing a final administrative settlement or referral to another agency for prosecution or enforcement. (DTSC Enforcement Response Policy ([DTSC-OP-0006](#)), (6/29/17.) Finally, DTSC is required to determine whether penalties being assessed are equal and consistent with the types of violations previously assessed penalties. (Cal. Code Regs., tit. 22, §66272.60(c).)

Initiation and completion of consistent and timely enforcement actions is necessary for a variety of reasons. Swift action promotes compliance throughout the regulated community and assures the public that it is protected. Penalizing violators, as appropriate, and depriving the violators of any economic benefit gained from non-compliance sends a message to both the regulated community and the public that non-compliance will not be tolerated.

A recent statutory change enacted by Assembly Bill No. 245 (AB 245; Chapter 499, Statutes of 2017) is inconsistent with a regulation that DTSC and other agencies rely on to enforce the California Hazardous Waste Control Laws. (HWCL; Health & Saf. Code § 25100 et seq.) DTSC has determined that this has created an emergency necessitating immediate action to avoid serious harm to the public peace, health, safety, and general welfare. Certainty must be provided to both the regulated community and the regulatory agencies that administer the HWCL. As a result of the inconsistency between the statutory change that took effect on January 1, 2018, DTSC has been unable to meet its statutory, regulatory and policy requirements to initiate and complete approximately 24 enforcement actions in a timely manner. The alleged violators include a variety of hazardous waste facilities including disposal facilities, used oil facilities, recyclers and transporters. Several of the inspections were funded by grants provided by US EPA as a result of DTSC commitments made to US EPA. Finally, the local agencies charged with inspecting and enforcing over 20,000 generators in the State have been unable to complete enforcement actions due to the inconsistency between the statute and the present regulation.

If DTSC were to engage in a full rulemaking, under the best circumstances, the amended regulation would not go into effect until November 2018, nearly a year after the statute was enacted. The Legislature did not contemplate that raising the statutory maximum would impede DTSC’s ability to conduct timely and complete enforcement

actions. Further, the public and the communities impacted by an enforcement action need to be reassured that their community is protected.

Immediate action is necessary for the proposed amendment to the regulation to effectuate a change in statute deemed necessary by the California Legislature. The passage of the emergency regulation is necessary to ensure the regulation and statute are consistent. This action makes the State regulation consistent with federal law and regulations. Eliminating the inconsistency allows DTSC, and authorized agencies, to meet its statutory, regulatory and policy commitments to initiate and complete timely enforcement actions of hazardous waste violations. Harmonizing the provisions requires immediate action to avoid serious harm to the public peace, health, safety and the general welfare.

#### **STATEMENT OF FACTS SUPPORTING FINDING OF EMERGENCY**

On October 5, 2017, Governor Edmund G. Brown Jr. signed AB 245. Effective January 1, 2018, AB 245 amended Health and Safety Code sections 25188, 25189, and 25189.2. The amendments made by AB 245 increase the maximum administrative and civil penalty for hazardous waste violations in California from \$25,000 to \$70,000 per day per violation.

DTSC first learned of the passage of AB 245 in October 2017, however DTSC did not have authority to implement a conforming regulatory change until statute became effective on January 1, 2018. DTSC determined that an emergency exists for immediate action to ensure that the regulation and the amended statute are consistent. DTSC has worked diligently in addressing the emergency despite resource constraints.

DTSC relies on regulations to assess administrative penalties for enforcement purposes. The penalty assessed for any violation is required to not exceed the maximum penalty specified in statute. (Cal. Code Regs., tit. 22, § 66272.61.) DTSC and other agencies, including a unified program agency, local health officer, or local public officer have the authority to issue and enforce administrative orders for violation of the HWCL. (*id.* at § 66270.60, subd. (b).)

In determining the initial penalty for each violation, DTSC considers the potential harm and the extent of deviation from hazardous waste management requirements. (Cal. Code Regs., tit.22, § 66272.62.) Further, DTSC is required to use a matrix to select an initial penalty amount for violations from the range provided in the matrix that corresponds to the appropriate extent of deviation and potential harm, whether they be major, moderate, or minimal. (*Id.* at subd. (d).) Consistent with statutory authorities prior to the enactment of AB 245, the matrix provides that where a violation's extent of deviation and potential for harm is "major," the appropriate initial penalty is \$25,000. All values in the penalty matrix are based on the statutory maximum. The enactment of AB 245 increased the maximum amount of penalty in statute from \$25,000 to \$70,000, a 280% increase to administrative and civil penalties. The penalty matrix in the regulation (Cal. Code Regs., tit. 22, § 66272.62) is now inconsistent with the statutory changes made by AB 245. To make the regulation consistent with statute, DTSC proposes to

increase all the penalty amounts in the penalty matrix by 280% to match the increase in the amended statute.

In 2017, the United States Environmental Protection Agency (U.S. EPA) amended the federal penalty regulations as mandated by the Federal Civil Penalty Inflation Act of 1990, as amended in 2015, which prescribes a formula for adjusting statutory civil penalties to reflect inflation, maintaining the deterrent effect of statutory civil penalties, and promoting compliance with the law. (82 Fed. Reg. 3633 (1/12/17).) As a result, U.S. EPA amended a table that provides civil monetary penalty inflation adjustments, including a statutory maximum for violations of the Resource Conservation and Recovery Act (RCRA). (40 C.F.R. § 19.4.) U.S. EPA also made amendments to raise the penalty amount for other environmental statutes including the Clean Water Act (33 U.S.C. § 1251 et seq.) and the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601 et seq.).

In amending the federal penalty regulations, U.S. EPA raised the maximum civil penalty amount, adjusted for inflation, for violations of federal hazardous waste management requirements of RCRA to \$71,164 per day per violation (42 U.S.C. § 6928, subd. (g)), and amended other regulations adopted to implement RCRA. Another example in the amended federal penalty regulations is the increase in the maximum penalty of \$57,391 for violation of a corrective action order issued pursuant to RCRA Section 3008, subd. (c) (42 U.S.C. § 6928, subd. (c)). (40 C.F.R. § 19.4. at Table 2.)

AB 245 was intended to make “California’s enforcement penalties for hazardous waste violations consistent with federal penalties by increasing both administrative and civil penalties for State hazardous waste management violations to \$70,000.” (Senate Bill Analysis (9/11/17) p.1.) Further, another Senate Bill analysis cited a July 2016 report from a statutorily created Independent Review Panel (Health & Saf. Code, § 57014) that recommended an “[i]ncrease [of] the maximum penalties for violations of the Hazardous Waste Control Act [sic] to make them equivalent to the federal maximum penalties for similar violations, with an inflation allowance.” (Senate Committee on Environmental Safety & Toxic Materials (undated), p. 2.)

Pursuant to State and federal laws, DTSC is the State agency authorized with administering the HWCL in lieu of RCRA. (42 U.S.C. § 6926; Health & Saf. Code, §§ 25101, subd. (d), 25159; California: Final Authorization of State Hazardous Waste Program (57 Fed. Reg. 18827 (5/1/92).) RCRA provides for federal oversight and enforcement of authorized State regulations. (42 U.S.C. §6926; 40 C.F.R. §271.1.) DTSC is required to adopt regulations to maintain authorization that conforms with the federal program, but is not prohibited from adopting regulations that may be more stringent and broader in scope than the corresponding federal regulations. As part of obtaining authorization from US EPA, DTSC entered into a Memorandum of Agreement with US EPA Region IX agreeing to keep US EPA informed of any modifications to this basic statutory regulatory authority, forms procedures or priorities. (Memorandum of Agreement between DTSC and US EPA, Region IX (1/23/99).) As an authorized State, California is required to revise its program to maintain authorization as the federal program changes. (40 C.F.R.271.21(e)(1).)

Here, US EPA amended the federal penalty regulations to raise the maximum civil penalty which, as an authorized State, DTSC must be consistent in applying and administering the increased penalty. (40 C.F.R. §271.16(a)(3)(1.)

Any proposed regulation, required for authorization, is required to be deemed a non-substantive change without regulatory effect for purposes of Section 100 of Title 1 of the California Code of Regulations. (Health & Saf. Code, § 25159.1.) Because, US. EPA and DTSC use different calculations in establishing a penalty, a change in DTSC's matrix in California Code of Regulations, title 22, section 66272.62(d) would not qualify as a non-substantive change.

As previously discussed, DTSC has already conducted inspections in 2018 that require enforcement action. Currently, the maximum penalty in statute and regulation are inconsistent. The new statutory changes increase civil penalties to a maximum of \$70,000 per day per violation. Current regulation specifies maximum civil penalties of up to \$25,000 per day per violation. This emergency rulemaking action by DTSC proposes to amend California Code of Regulations, Title 22, Division 4.5, Chapter 22, Article 3, § 66272.62 to increase administrative and civil penalties to a maximum of \$70,000 per day per violation of the HWCL consistent with the changes AB 245 made in statute. This change would also make State law consistent with federal law and regulations as required by DTSC's authorization to implement State law in lieu of RCRA.

## **AUTHORITY & REFERENCE**

### **AUTHORITY**

The regulation is being adopted under the following authorities:

Health and Safety Code section 25150 grants DTSC the authority to adopt, and revise when appropriate, standards and regulations for the management of hazardous wastes to protect against hazards to public health, domestic livestock, wildlife, or the environment.

Health and Safety Code section 25159 grants DTSC the authority to adopt and revise regulations that allow the State to receive and maintain authorization to administer a State hazardous waste program in lieu of RCRA.

Health and Safety Code section 25159.5 provides that when DTSC is adopting or revising standards and regulations, DTSC is required, insofar as practicable, to make the standards and regulations conform with the corresponding regulations adopted by U.S. EPA pursuant to RCRA.

Health and Safety Code section 58012 authorizes DTSC to adopt and enforce regulations for the execution of its duties.

Health and Safety Code section 25188 grants DTSC the authority to issue a civil penalty of not more than \$70,000 for each day of non-compliance to persons subject to an order pursuant to 25187.

Health and Safety Code section 25189 provides that a person who intentionally or negligently violates provisions of the hazardous waste management laws may be liable for a civil penalty of not more than \$70,000 for each separate violation or, for continuing violations, for each day that violation continues.

Health and Safety Code section 25189.2 provides strict liability in that any person who violates provisions of hazardous waste management laws may be liable for a civil penalty of not more than \$70,000 for each separate violation or, for continuing violations, for each day that violation continues.

## **REFERENCE**

The proposed regulation implements, interprets, or makes specific the following statute:

Health and Safety Code 25187 states DTSC or a unified program agency may issue an order requiring that a violation be corrected and imposing an administrative penalty, for any violation of the hazardous waste management laws or any permit, rule, regulation, standard, or requirement issued or adopted pursuant to the HWCL, whenever DTSC or a unified program agency determines that a person has violated, is in violation of, or threatens to violate the HWCL, or any permit, rule, regulation, standard, or requirement issued or adopted pursuant to the HWCL or the Hazardous Substance Account Act (commencing with Health & Saf. Code, § 25300 et seq.).

## **INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW**

Existing law and regulations permit DTSC or an authorized agency, known as a unified program agency, to implement and enforce the HWCL. These laws and regulations allow DTSC and the unified program agencies to perform inspections of hazardous waste facilities and hazardous waste generators. Inspections may result in administrative or civil penalties for certain violations of any permit, rule, regulation, standard, or requirement issued or adopted pursuant to the laws regulating hazardous waste and hazardous substances.

Prior to the enactment of AB 245, a person who failed to comply with a schedule for compliance or who intentionally or negligently violated hazardous waste laws may be liable for a civil penalty not to exceed \$25,000 for each separate violation or, for continuing violations, for each day that the violation continues. DTSC's regulations for assessment of administrative penalties, utilized by DTSC and authorized agencies, state that any "penalty assessed . . . shall not exceed the maximum penalty specified in statute." (Cal. Code Regs., tit. 22, §§ 66272.61, 66272.63, subd. (d), 66272.67, subd. (e), 66272.69 [The final penalty shall not exceed the statutory maximum.] )

Effective January 1, 2018, AB 245 amended Health and Safety Code sections 25188, 25189, and 25189.2 to increase administrative and civil penalties to a maximum of \$70,000 per day per violation.

The regulation amended by this proposed emergency rulemaking would reflect the aforementioned (January 1, 2018) changes in statute. The amendment to the regulation would increase administrative and civil penalties to a maximum of \$70,000 per day per violation to be consistent with statutory changes.

The amendment to the regulation is intended to provide notice and consistency to the regulated community and the regulatory agencies. Clearly, the Legislature intended that the penalties are necessary to protect public health and safety, worker safety and the environment. It promotes fairness and transparency to the regulated community and government.

#### Anticipated Benefits

Amendment of the regulation would provide an added deterrent to the regulated community and encourage compliance with the HWCL. As a result, it would better protect California's people and environment from harmful effects of toxic substances by enforcing hazardous waste laws, reducing hazardous waste generation, and encouraging the manufacture of chemically safer products.

#### Summary of Existing Statutes and Regulations

Effective January 1, 2018, Health and Safety Code sections 25188, 25189, and 25189.2 were amended, to provide for the assessment of administrative and civil penalties up to a maximum of \$70,000 for violations of the HWCL.

The existing regulation, California Code of Regulations, title 22, section 66272.62, uses a matrix that evaluates potential for harm and extent of deviation to calculate penalty amounts with a maximum of \$25,000 per violation per day. An inconsistency exists between the newly amended statutes and existing regulation.

#### Relation to Existing Federal Regulations

Penalties under federal law can be found in 40 Code of Federal Regulations, Chapter I, Subchapter A, Part 19, Section 19.4. The amendment of this regulation would not conflict with, or modify, any federal law. Rather, it would harmonize and make the proposed regulation amendment consistent with federal law and regulations.

#### Relation to Existing State Regulations

The authority to assess penalties under State regulations can be found in California Code of Regulations, title 22, section 66272.60 et seq. The amendment of this regulation would ensure consistency between federal law and regulations and State law and regulations. The amendment of this regulation would not conflict with State law or regulation.

### **DISCLOSURE REGARDING THE PROPOSED ACTION**

#### MANDATES ON LOCAL AGENCIES OR SCHOOL DISTRICTS

DTSC has determined that the proposed changes to the regulation would not impose a mandate on local agencies or school districts and would require no State

reimbursement pursuant to Part 7 of Division 4, commencing with section 17500, of the Government Code.

*COST OR SAVINGS TO STATE OR LOCAL AGENCIES, OR SCHOOL DISTRICTS  
SUBJECT TO REIMBURSEMENT*

DTSC has determined that no fiscal impact exists. This regulation does not affect any local entity or program.

*COST OR SAVINGS IN FEDERAL FUNDING TO THE STATE*

DTSC has determined that no fiscal impact to federal funding to the state exists.

*DETERMINATION OF NO SIGNIFICANT STATEWIDE ECONOMIC IMPACT*

DTSC has determined that the proposed changes to the regulation would not create a significant statewide economic impact.

*COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES*

DTSC has determined that the proposed changes to the regulation would not create a significant impact on representative private persons or businesses that comply with the State's hazardous waste laws.

*EFFECT ON SMALL BUSINESSES*

DTSC has determined that the proposed changes to regulation would not have an effect on small businesses.

*EFFECT ON HOUSING COSTS*

DTSC has determined that the proposed changes to regulation would not have an effect on housing costs.

*RESULTS OF THE ECONOMIC IMPACT ANALYSIS*

DTSC has determined that the proposed changes to regulation would not create a significant economic impact.

*CONSIDERATION OF ALTERNATIVES*

Revision of the regulation is necessary to ensure consistency with the statutory changes and federal law and regulations. Failure to amend the regulation would create confusion and inconsistency when assessing penalties for violations of hazardous waste management requirements.